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No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

RESPONSE TO MOTION TO DISMISS

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PETITION FOR CERTIORARI FILED AUGUST 5, 1988
CERTIORARI GRANTED OCTOBER 11, 1988

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RESPONSE TO MOTION TO DISMISS

The State of South Carolina, the Petitioner herein, makes a response to the Motion to Dismiss. In its Motion, the Respondent, Demetrius Gathers, contends that this Court is without jurisdiction to review the judgment of the South Carolina Supreme Court. The Petitioner would respectfully present the following:

I. PROCEDURAL HISTORY

On August 5, 1988, the Respondent, State of South Carolina, filed a Petition for Writ of Certiorari to the Supreme Court of South Carolina in the United States Supreme Court pursuant to 28 U.S.C. §1257(3). In the Petition, the Respondent raised the following questions:

I. Does the Eighth Amendment preclude a prosecutor's comments during a capital murder penalty phase on personal characteristics of the victim where the characteristics are based on evidence admitted in the guilt phase to show the circumstances of the crime?

II. Does Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), preclude prosecutorial comment during a penalty phase closing argument on evidence introduced during the guilt phase of the trial that reveals personal characteristics of the victim?

III. Whether this Court's decision in Booth v. Maryland, supra, misconstrued the requirements of the Eighth Amendment and was wrongly decided?

On October 11, 1988, the United States Supreme Court issued its Order granting the Respondent's Petition for Certiorari. State of South Carolina v. Demetrius Gathers, ___ U.S. ___, 109 S.Ct. 218 (1988). Briefing schedule was established and the State of South Carolina's Brief on the Merits was filed on December 9, 1988. The brief on behalf of Mr. Gathers is due thirty (30) days from the filing. As stated in our Petition for Certiorari, the remittitur was sent to the Court of General Sessions on June 17, 1988. (Petition, p. 2). Further, no re-sentencing hearings have been held in the matter. See Section 1-7-330, CODE OF LAWS (1976) (solicitor's authority concerning the preparation of the docket and order in which the cases are called).

The Respondent made an Order of Clarification on October 25, 1988, requesting the Supreme Court of South Carolina to reconsider its prior decision. On December 9, 1988, the Supreme Court issued its Order denying the Motion.

II. ARGUMENT

In its initial argument in the Motion to Dismiss, the Respondent contends that certiorari review should be barred because the remittitur was sent to the lower court in accordance with South Carolina law and procedure. Rule 17, Rule of the Supreme Court of South Carolina. We submit that this Court's precedent does not support the position of the Respondent. Further, the Respondent has misapprehended the authority and jurisdiction of the South Carolina Supreme Court in both precedent and practice.

The United States Supreme Court has consistently stated that the mere fact the remittitur has been sent down does not divest the United States Supreme Court of its jurisdiction in this matter. In Carr v. Zaja, 283 U.S. 52, 53, 51 S.Ct. 360, 75 L.Ed. 836 (1931), Justice Holmes, for the Court, stated on similar facts that:

> It is objected that the mandate of the Circuit Court of Appeals was not stayed, but was issued to the District Court and spread upon its records and that therefore the case is finished. But that does not defeat the jurisdiction of this Court. The Conqueror, 166 U.S. 110, 113, 17 S.Ct. 510, 41 L.Ed. 937 (1897); Louisville and Nashville R. Co. v. Behlmore, 169 U.S. 644, 648, 18 S.Ct. 502, 42 L.Ed. 889 (1898).

In The Conqueror, supra, the Court stated: "The fact that the mandate of the circuit court of appeals to the district court, affirming the decision of that court, had gone down is immaterial ... if a writ of certiorari

can issue at all after a final disposition of the case in that court, it could not be defeated by the issue of a mandate to the court below." 166 U.S. 110, 113-114. In Louisville R. Co., supra, the Court stated:

> When cases are brought here from the circuit court of appeals, we are, of course, called on to review the judgments of those courts, in revision of the judgments of the courts below, but our mandate goes to the court of first instance, and is there carried into effect, though the court of appeals may have sent its own mandate down before the case was brought to this court of appeal, writ of error, or certiorari.

69 U.S. at 648. Similarly, in Aetna Casualty and Surety Company, et al. v. Flowers, 330 U.S. 464, 467 (1947), the Court stated "nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction," citing Carr v. Zaja, supra. More recently, Justice Rehnquist

for the Court has cited this same fundamental rule of law with approval. U.S. v. Villamonte-Marquez, 462 U.S. 579, 581 n.2 (1983). [The fact that the government did not obtain a stay, thus permitting the issuance of the mandate of the Court of Appeals, would not change the effect of our reversal (to reinstate the conviction and sentence)]. Clearly then, we submit that certiorari jurisdiction in the United States Supreme Court is not affected or defeated by the fact that the remittitur was sent to the Circuit Court on June 16, 1988. Petitioner further submits that the Supreme Court was made aware of this fact of the remittitur being sent down in our Certiorari Petition on page two.

The Petitioner further submits that while the Respondent has generally stated the law of remittitur accurately,

it failed to bring to the Court's attention certain obvious exceptions that have arisen in South Carolina practice. The power of the South Carolina Supreme Court to recall the remittitur under appropriate circumstances is well established. In State v. Merriman, 34 S.C. 576, 578, 13 S.E. 898 (1890), Justice McIver stated in general terms that such motion can be made in the South Carolina Supreme Court to recall the remittitur if it has not been acted upon by the lower court. In a subsequent decision, State v. Merriman, 35 S.C. 607, 14 S.E. 394 (1892), that where the Circuit Court had already acted in fully carrying out the mandate, thereby assigning a day for the execution of a sentence, it was too late to make the motion. Similarly, in State v. Keels, 39 S.C. 553, 554, 17 S.E. 724 (1893), in a per curiam decision, the

Court stated in denying a motion to recall the remittitur:

> [I]t is more than questionable whether this Court has the power to recall the remittitur after it has been sent down to the Circuit Court, and acted upon by that Court, which as we are informed on the argument here, was the fact in this case ....

(Emphasis in original). Accord McKenzie v. Sifford, 52 S.C. 394, 26 S.E. 706 (1898). (Court will not recall a remittitur granting a new trial after the new trial had been held).

More recently, this Court has been involved in three (3) matters in which the Court granted certiorari, vacated the judgment of the South Carolina Supreme Court and remanded the matter for further consideration. Edward Lee Elmore v. South Carolina, 476 U.S. 1102 (May 5, 1986); Donald Allen Jones v. South Carolina, 476 U.S. 1102 (May 5, 1986); Jerry W. Plemmons v. South

Carolina, 476 U.S. 1103 (May 5, 1986). The remittitur from each of these matters had previously been sent to the lower court by the South Carolina Supreme Court on March 5, 1986, March 5, 1986, and July 16, 1985, respectively. Upon receipt of the mandate from the United States Supreme Court, the Supreme Court of South Carolina remanded each of the matters to the trial court for a new sentencing proceeding on June 6, 1986. The Petitioner, under separate cover, is providing copies of these matters to the Clerk of this Court and counsel.

Clearly, the timely filing of the Petition for Certiorari from the judgment of the South Carolina Supreme Court rendered appropriate jurisdiction in this Court, pursuant to Rule 20 of the Rules of the United States Supreme Court and 28 U.S.C. § 1257(3) and 28 U.S.C. § 1201. Further, there has been

of mootness in the matter since the resentencing proceedings have not occurred. See North Carolina v. Rice, 404 U.S. 244 (1971); United States v. Sharpe, 470 U.S. 675 (1985); Garrison v. Hudson, 468 U.S. 1301 (1984). His assertions to the contrary are simply not supported by this Court's clear and unequivocal precedent. Carr v. Zaja, supra.

The Respondent has further misapprehended this Court's decision in Henry v. Mississippi, 379 U.S. 443 (1965), which is both factually and legally distinguishable from the present situation. In Henry, supra, this Court held that the Court will decline to review state court judgments that rest upon independent and adequate state grounds, such as the procedural default of failing to object to the federal ground that served a legitimate state

interest. Similarly, in Wainwright v. Sykes, 433 U.S. 72 (1977), this Court held generally that federal habeas corpus review may be similarly barred where the contemporaneous objection to the admission of a confession was not made as required by state law to preserve the issue for appeal unless cause and prejudice for such default is shown. Since the South Carolina practice has been to routinely send the remittitur to the lower court in every case, to accept the Respondent's logic would be to bar federal review of every conviction or appeal from South Carolina in certiorari or habeas corpus review, even though the jurisdictional requirements for review have been met. The prior decisions of this Court do not support such a view and the prior practice of the South Carolina courts does not require such a result.

The Respondent further contends that the mere filing of a motion for a speedy trial defeats the jurisdiction of this Court in the matter. As of the filing of this response, no time certain for any resentencing proceeding has been set. See Section 1-7-330, CODE OF LAWS (1976) (solicitor's authority to establish the docket and order of cases to be called). This Court has previously issued a stay of state court proceedings pursuant to an Order of the Federal District Court where "the normal course of appellate review might otherwise cause the case to become moot." Garrison v. Hudson, 468 U.S. 1301 (1984). Therein, Justice Burger held that "foreclosure of certiorari review by this Court would impose irreparable harm upon applicants." Here, where counsel had control of the docket and no day certain for the

resentencing has been set, his present speculation that the Court will be faced with a situation of "mootness" and an advisory situation is simply not supported by the status of the present proceedings in South Carolina. Simply put, the jurisdictional power of this Court has not been lost. This is especially true where the Respondent conceded in his motion before this Court that "the granting of a Petition for Certiorari has been held to operate as a stay of lower court proceedings." (Motion to Dismiss, p. 8).

Finally, in his Motion to Dismiss, he contends that he moved before the South Carolina Supreme Court for clarification of its opinion requesting the state court to rule that it granted the relief on the basis of a state ground rather than the clear and unambiguous statement of the state court

that they found a violation of the Eighth Amendment. The State of South Carolina responded that the court lacked jurisdiction over the matter because it was an untimely petition for rehearing and that the court was clear in its holding. We specifically stated in our response that this Court had jurisdiction to require the state court to act in accordance with the mandate of this Court on remand and the state court had authority to recall the remittitur when appropriate. On December 9, 1988, the state court denied the belated motion for clarification.

In his conclusion, the Respondent seeks to have the certiorari matter dismissed as being improvidently granted. For the reasons stated herein, the Petitioner respectfully submits that the Motion is ill-founded and must be dismissed. Alternatively, he seeks a remand for a clarification of the

opinion of the South Carolina Supreme Court. This issue was raised in the Brief in Opposition of the Respondent. Here, there was no ambiguity in the lower court's decision that it rested solely upon its interpretation of the Eighth Amendment. As this Court has stated:

> When, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 1040-1041 (1983). Here, the state court clearly stated "because the solicitor's remarks violated the eighth amendment rights, we reverse the death sentence." (J.A. p. 66). Further clarification is not necessary. His motion should be denied and dismissed.

CONCLUSION

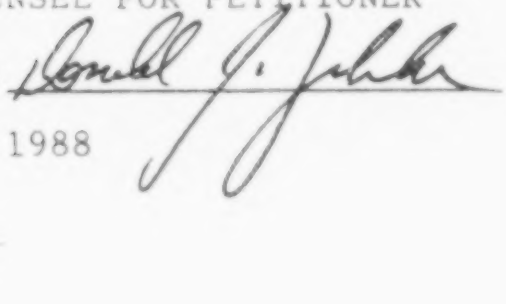
For all the foregoing reasons, the Motion to Dismiss of the Respondent should be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

DONALD J. ZELENKA
Chief Deputy Attorney General

COUNSEL FOR PETITIONER

By: 

December 19, 1988

No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,

Petitioner,

versus

DEMETRIUS GATHERS,

Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Petitioner's Response to Motion to Dismiss on the Respondent by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to William Isaac Diggs, Esquire, 1122 Lady Street, Suite 301, Columbia, South Carolina 29201. He further certifies that all parties required to be served have been served.

This 19th day of December, 1988.

Donald J. Zelenka

SWORN to before me this
19th day of December, 1988.

(LS)
Notary Public for South Carolina
My Commission Expires: 4-14-97.

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SUPREME COURT OF THE UNITED STATES
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STATE OF SOUTH CAROLINA,

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versus

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Respondent.

AFFIDAVIT OF FILING

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he is a member of the Bar of this Court and that on this date he filed the original and forty copies of Petitioner's Response to Motion to Dismiss in the above captioned case by depositing same in the U. S. Mail, first-class postage prepaid, and properly addressed to the Clerk of this Court.

This 19th day of December, 1988.

Donald J. Zelenka

SWORN to before me this
19th day of December, 1988.

Notary Public for South Carolina
My Commission Expires: 4.1.97.